IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

TUESDAY, THE 3RD OCTOBER 2006 / 11TH ASWINA 1928

CRL.A.No. 515 of 2000(C)

CC.316/1996 of JUDL. MAGISTRATE OF FIRST CLASS COURT, VARKALA

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APPELLANT:

D.DAYANANDA BABU,
C.C. BHAVAN, MULLARAMCODE,
NEAR PRESIDENT JUNCTION,
VADASSERIKONAM.

BY ADV. SRI.T.M.ABDUL LATHEEF

RESPONDENTS:

M/S. VIJAYA AUTOMOBILES AND GENERAL,
ENGINEERING WORKS, MAVINMOODU,
KALLAMBALAM.

S.SASIDHARAN, PROPRIETOR,
M/S VIJAYA AUTOMOBILES & GENERAL
ENGINEERING WORKS, MAVINMOODU,
KALLAMBALAM.

BY ADV. SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS
PUBLIC PROSECUTOR K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

CRL.A. 515/2000

DATED THIS THE 3RD DAY OF OCTOBER, 2006

JUDGMENT

The right of the appellant-complainant in proceeding with an appeal, preferred after obtaining special leave, challenging the order of acquittal of the accused under Section 138 of the Negotiable Instruments Act, in short 'the Act', even after the death of the accused, is the point that is raised for consideration of this Court.

2. The appellant was the complainant, in C.C.No.316/1996 on the file of the Judicial Magistrate of First Class, Varkala. After appreciating the evidence adduced by both sides, the trial Court found the accused not guilty and therefore, acquitted him. On obtaining special leave, the appellant came before this Court preferring this appeal, under Section 378 of the Code of Criminal Procedure, 1973, in short Cr.P.C.

3. During the pendency of the appeal, it is conceded by either side that the accused died. A question

therefore, arose whether an appeal could be pursued by the complainant, appellant, after impleading the legal representatives of the deceased accused.

Section 394 Cr.P.C., state as follows:-

> **Abatement of appeals**- (1).Every appeal under Section 377 or section 378 shall finally abate on the death of the accused.
> (2). Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:
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> Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.
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> Explanation.- In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

4. Section 377 Cr.P.C. is dealing with the appeal,

preferred by the concerned State Government, against the sentence on the ground of its inadequacy. Section 378 Cr.P.C., is dealing with the appeal in the case of acquittal of the accused, on different stages and conditions. Thus every appeal that is preferred challenging the inadequacy of the sentence or on the ground of acquittal of the accused, would finally abate on the death of the accused.

5. However, it is necessary to differentiate that all the appeals, filed under chapter XXIX of Cr.P.C., (except an appeal from a sentence of fine) shall finally abate on the death of the appellant; unless leave is granted by the Court on the application of the near relatives of the deceased, to continue with the appeal in case of sentence passed, is of death or of imprisonment.

6. The bar placed reliance on State of Andhra Pradesh v. S. Narasimha Kumar and others (2006 (5) SCC 683). The facts of the case show that accused persons therein were found guilty and therefore, convicted under various offence of the Indian Penal Code and therefore, awarded sentence of various descriptions.

However, High court had set aside the conviction and sentence of the third accused, one Chandra Sekhar. Therefore, the State challenged the same, on obtaining special leave before the apex Court, under article 136 of the Constitution of India. The wife of the deceased, on the other hand, contented relying on Section 394 Cr.P.C, that on the death of the accused, the proceedings against the accused would abate. Where as the State had maintained that, Section 394 Cr.P.C does not govern the case of an appeal by special leave before the apex Court.

7. After elaborate discussions of the provisions of Cr.P.C relating to Sections 394, 431, 411-A(2) and 417, the Court came to the conclusion that appeals, preferred against the acquittal of the accused, would finally abate on the death of the accused. The above legal position had been adopted, relying on the principle that the dead persons are beyond the processes of human tribunal and as had been recognised in the limb of Section 431 Cr.P.C that appeals against acquittals, finally abate on the death of the accused.

8. On analysis, it could be seen that when the accused dies and he faced the conviction and sentence of imprisonment and fine, imposed by the Court and an appeal, preferred from such an order of sentence, could be considered as an appeal preferred, challenging the imposition of fine. Therefore, exemption contained in sub section 2 of Section 394 Cr.P.C., will be applicable. This principle of exempting an appeal under the Cr.P.C, from abatement, is for the reason that fine constitutes a liability on the estate of the deceased and the legal representatives on whom, the estate devolves are entitled to ward off that liability subject to the period mentioned under Section 70 IPC. The apex Court accordingly came to the conclusion that as the appeal, filed by the State of Andhra Pradesh, challenges the correctness of the judgment of the High Court, the death of the accused makes the appeal abated.

9. In the case at hand, the complainant is before this Court, by preferring the appeal challenging the acquittal of the accused by the trial Court. If the case is proceeded with as per the law, and ultimately if there is

a conviction, the accused had to be convicted and sentenced under Section 138 of the Act. In case of imprisonment, he has to suffer the same and if there is fine, he has to pay the fine. As the accused is not before the Court, to face such a verdict, under Section 394 Cr.P.C., the appeal would abate on the death of the accused.

10. Thus, the appellant has got no right to continue with an appeal, preferred, challenging the acquittal of an accused in a complaint, under Section 138 of the Act, when the respondent-accused died during the pendency of the appeal even if the same is preferred after obtaining special leave, as the appeal would abate on the death of the respondent-accused.

The appeal accordingly fails and is dismissed.

J.M.JAMES
JUDGE

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